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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Appendix Thereto

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Christiansburg Garment Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported but is unofficially reported at 14 FEP Cases 262. The opinion of the District Court appears sub nom, *Equal Employment Opportunity Commission v. Christiansburg Garment Company, Inc.* and is reported at 376 F. Supp. 1067 (W.D. Va. 1974).

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should the standard applied by District Courts in awarding attorney's fees to a prevailing defendant in a Title VII action under the Civil Rights Act of 1964, as amended, (42 U.S.C. §2000e) be the same as the standard for awarding attorney's fees to a prevailing plaintiff. If not, what should the standard be?

STATUTE INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k) provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

STATEMENT

A. Facts

On February 1, 1968, Rosa C. Helm, a black employee of Christiansburg, was laid off from her job at petitioner's plant in Christiansburg, Virginia. She returned to work about one month later and in May of 1968 filed a charge with the Commission alleging racial discrimination in her one month lay off. The charge was processed and investigated by the Commission. By letter dated Febraury 11, 1970, Christiansburg was advised that there was reasonable cause to believe that it had engaged in employment practices violative of Title VII. Attempts at conciliation were unsuccessful and by letter of July 1, 1970 the Commission notified Mrs. Helm of her right to sue. Mrs. Helm, however, did not exercise her right within the thirty day statutory period. (App. 5A)*

*Appendix included with this petition.

Under the 1972 Amendments to the Civil Rights Act of 1964, which became effective on March 24, 1972, the Commission was authorized to bring suit in its own name to secure compliance with Title VII. On January 25, 1974, the Commission instituted suit on Mrs. Helm's claim in the District Court against Christiansburg. After discovery proceedings were concluded, Christiansburg filed a motion for summary judgment. The District Court, holding that the Commission had no authority to prosecute the action under the 1972 Amendments, granted the summary motion on the basis that Mrs. Helm's claim was not pending with the Commission on the effective date of the 1972 Amendments as required by Section 14 thereof. The court concluded that when Mrs. Helm was notified on July 1, 1970 of her right to bring suit against Christiansburg there was no further action to be taken by the Commission with respect to her charge and accordingly its authority terminated on that date. The Commission did not appeal from this judgment. (App. 5A-6A)

In July, 1975 Christiansburg filed its petition for attorney's fees pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k). The District Court denied Christiansburg's petition. (App. 6A)

B. The Decision of the District Court

The decision of the District Court is summarized in the next to last paragraph of its opinion as follows:

> "Although petitioner prevailed on its motion for summary judgment, the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless. Of the three grounds raised by petitioner in support of its motion for summary judgment, this court ruled in favor of the Commission on two of the grounds. But more importantly, the basis upon which petitioner prevailed was

an issue of first impression requiring judicial resolution. The Commission's statutory interpretation of §14 of the 1972 amendments was not frivolous, and the court has no doubt this suit represented a good faith effort by the Commission to vigorously pursue the duties assigned to it by Congress under Title VII. In such circumstances the court does not believe that an award of attorney's fees against the Commission is justified." (App. 2A-3A)

C. The Decision of the Court of Appeals

A majority of the panel in the Court of Appeals affirmed the District Court. The majority in its opinion concluded: (1) the "policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant", and (2) the Commission did not act in "bad faith in bringing the lawsuit".

The dissent pointed out, first, that the Ninth Circuit in *Van Hoomissen v. Xerox Corporation*, 503 F.2d 1131 (9 Cir. 1974) came "to the opposite conclusion in a case very nearly indistinguishable on its facts from that present here." Secondly, Judge Widener stated:

> "The principle point of my dissent, however, is that the opinion of the majority creates a double standard in the application of Title VII. Employers are forbidden by the Civil Rights Act to apply double standards to their employees, and I do not accept the proposition that the courts should administer one standard for the plaintiff and a very different standard for the defendant in the prosecution and defense of suits under the statute."

REASONS FOR GRANTING THE WRIT

The writ should be granted for two reasons. First, the decision of the Fourth Circuit in this case conflicts with the

decision of the Ninth Circuit in *Van Hoomisen v. Xerox Corporation, supra*, and with the decision of the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Secondly, the plain language of the statute does not suggest or warrant different standards in awarding attorney's fees to prevailing plaintiffs and defendants.

The Supreme Court construed a similarly phrased statute* in *Newman v. Piggie Park Enterprises, supra*, under Title II of the same statute and held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." The Fourth Circuit followed that reasoning in awarding Title VII prevailing plaintiffs attorney's fees in *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4 Cir. 1971) and *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4 Cir. 1971).

But here what's sauce for a goose is not sauce for a gander. The Fourth Circuit majority attributes to Congress in a statute designed to eliminate discrimination an intent to discriminate between plaintiffs and defendants. The rule of the Fourth Circuit majority is that prevailing plaintiffs ordinarily should be awarded attorneys' fees while prevailing defendants ordinarily should *not be* awarded attorneys' fees. Only if the plaintiff has acted in "bad faith" may a prevailing defendant recover.

The Fourth Circuit majority in rejecting equal treatment of prevailing plaintiffs and defendants did so on "policy consideration". As noted in the dissent, "policy considerations are not matters for the court, but are matters for Congress". Unless "policy considerations" are to override the statutory

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*42 U.S.C., §2000a-3(b) provides the court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .".

language, the statute should be construed as non-discriminatory and in accordance with its plain meaning—i.e., that the standard for awarding attorney's fees to a prevailing party should be the same for plaintiffs and defendants.

The language of the statute is not ambiguous, so resort to the legislative history is hardly necessary to determine Congressional intent. Even so, a review of the only relevant legislative history, which deals with the Title II language, confirms that the statute means what it says.

The original House version of the 1964 Civil Rights Act provided that "the person aggrieved . . . shall if he prevails be allowed a reasonable attorneys' fee as part of the costs." Hearings on H.R. 7152, House Committee on Rules, 88th Cong., 2nd Sess. pt. 1, at 17 (1964). The bill, as enacted, authorized fee awards to the "prevailing party", not merely to the "person aggrieved." The obvious purpose was to treat prevailing plaintiffs and defendants alike and make outcome of litigation the determinative factor. This parity of treatment was cited when the Senate rejected an amendment by Senator Ervin which would have deleted any fee provision from Title II. 110 CONG. REC. 14201 (1964). Debate on the amendment centered on Senator Ervin's concern that fee awards would encourage "ambulance chasing" by plaintiffs. The amendment was defeated after Senator Pastore pointed out the discretionary power of courts to award fees to the "prevailing party" defendant: "When a person realizes that he takes the chance of having attorneys' fees assessed against him if he does not prevail, he will deliberate before he brings suit." Id, at 14214. At no point during debate on Title II was there any indication that the standards would depend upon whether the "prevailing party" was a plaintiff or defendant.

The Congressional intent expressed in the plain language of the statute and in its legislative history seems abundantly

clear—prevailing parties, be they plaintiffs or defendants, are to be treated alike in awarding attorney's fees.

If equality of treatment is not to be the standard, petitioner submits that the standard for prevailing defendants should not be the subjective standard of "bad faith".

In *Newman v. Piggie Park Enterprises, Inc., supra,* dealing with attorney fees under Title II, the Supreme Court noted:

> "In remanding the case, the Court of Appeals instructed the District Court to award counsel fees only to the extent that the respondents' defenses had been advanced 'for purposes of delay and not in good faith.' 377 F.2d, at 437. We granted certiorari to decide whether this subjective standard properly effectuates the purposes of the counsel-fee provision of Title II of the Civil Rights Act of 1964. . . . We hold that it does not."

The court went on to note in Footnote 4:

> "4. If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' "

Clearly, the Supreme Court has rejected the "bad faith" standard for awarding attorney's fees. In addition, the Supreme Court noted that the "bad faith" standard for awarding attorney's fees exists independent of any statutory authority. By adopting the "bad faith" standard for awarding attorney's fees to prevailing defendants in Title VII cases, the Fourth Circuit has adopted what the Supreme Court rejected in *Newman, supra.*

Petitioners contend that if a standard other than one of equal treatment is to prevail, it should be an objective standard—was the plaintiff's action in instituting and pursuing the action reasonable—did plaintiff have a reasonable probability of prevailing? If not, the defendant should be awarded attorney's fees. We believe this is the standard implicit in *Van Hoomisen, supra*. It is the standard followed by the District Court in *EEOC v. Western Electric Co.*, —F. Supp.—, 10 FEP Cases 1275 (D.C. Md. 1975).

In *Van Hoomisen, supra,* defendant prevailed on a procedural point. In the case at bar, the defendant prevailed on a procedural point—lack of authority in the Commission to bring the suit. The defendant in *Van Hoomisen* was awarded attorney's fees. The defendant in the case at bar was not. In the case at bar the legislative history left little doubt of the judicial outcome. The EEOC could not or should not have had a reasonable expectation of prevailing in the District Court. The petitioner should have been awarded attorney fees.

CONCLUSION

Therefore, the petitioner respectfully requests that this court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM W. STURGES

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. CHRISTIANSBURG GARMENT COMPANY, INCORPORATED, *Defendant,*	CIVIL ACTION No. 74-18 MEMORANDUM OPINION and ORDER BY: James C. Turk, Chief U. S. District Judge

This case is before the court pursuant to the petition of Christiansburg Garment Company, Inc. (hereinafter "petitioner") for the allowance of attorney's fees against the Equal Employment Opportunity Commission (hereinafter the "Commission").

On January 24, 1974, the Commission filed suit against petitioner pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.* (Supp. 1972) alleging racially discriminatory employment practices. Petitioner thereafter filed a motion for summary judgment on the following grounds: (1) that the suit was time barred under §706(f)(1) of Title VII, 42 U.S.C. §2000e-5(f)(1), which precludes suits being filed more than 180 days after a charge of discrimination was filed with the Commission or the 1972 amendments to Title VII became effective; (2) that alternatively the suit was time barred by the Virginia two-year statute of limitations governing "every action for personal injuries," VA. CODE ANN. §8-24, as amended (Supp. 1973); and (3) that the Commission was without authority to institute the suit because under section 14 of the 1972 amendments to Title VII the Commission's new power to bring suit

was made applicable only "to charges pending with the Commission on the date of enactment of [the 1972 amendments] and all charges thereafter." This court rejected petitioner's arguments that suit was time barred by §706(f)(1) or the Virginia statute of limitations but granted summary judgment on the bases that a charge was not "pending with the Commission" on March 24, 1972 when the Act was amended to give it the power to institute suit. *Equal Employment Opportunity Commission v. Christiansburg Garment Co., Inc.*, 376 F. Supp. 1067 (W.D. Va. 1974).

Petitioner's "Petition for Allowance of Attorney's Fees" is filed pursuant to section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k), which provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

In opposition to the petition, the Commission argues as follows: (1) that the petition should be disallowed because it was not timely filed; (2) that §706(k) should be construed as not authorizing an award of attorney's fees against it; and (3) as a matter of discretion, the court should not award attorney's fees against it in this case. The court need not decide the Commission's first two contentions because in the exercise of its discretion the court is of the opinion that an award of attorney's fees to petitioner is not justified in this case.

Although petitioner prevailed on its motion for summary judgment, the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless. Of the

three grounds raised by petitioner in support of its motion for summary judgment, this court ruled in favor of the Commission on two of the grounds. But more importantly, the basis upon which petitioner prevailed was an issue of first impression requiring judicial resolution. The Commission's statutory interpretation of §14 of the 1972 amendments was not frivolous, and the court has no doubt this suit represented a good faith effort by the Commission to vigorously pursue the duties assigned to it by Congress under Title VII. In such circumstances the court does not believe that an award of attorney's fees against the Commission is justified. *Accord, United States Steel Corp. v. United States,* F.2d (3d Cir. 1974); *Richardson v. Hotel Corporation of America,* 332 F. Supp. 519 (E.D. La. 1971), *aff'd* 468 F.2d 951 (5th Cir. 1972); *Paddison v. Fidelity Bank*, 60 F.R.D. 695 (E.D. Pa. 1973).

Accordingly, on the basis of the reasons and authority stated, the Petition for Allowance of Attorney's Fees is denied.

DATED: This 28th day of July, 1975.

JAMES C. TURK
Chief U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2131

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellee,

versus

CHRISTIANSBURG GARMENT COMPANY, INC.,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
James C. Turk, District Judge.

Argued May 7, 1976 Decided January 12, 1977

Before RUSSELL, Circuit Judge; FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge

William W. Sturges (John J. Doyle, Jr., Weinstein, Sturges, Odom, Bigger and Jonas; William B. Poff on brief) for Appellant; Lang Dover, Attorney for Equal Employment Opportunity Commission (Abner W. Sibal, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Charles L. Reischel, Richard S. Cohen and Ramon V. Gomez, Equal Employment Opportunity Commission on brief) for Appellee.

FIELD, Senior Circuit Judge:

After successfully defending an action brought against it by the Equal Employment Opportunity Commission (Commission) under Title VII of the Civil Rights Act of 1964, as

amended, 42 U.S.C. §§2000e, *et seq.*, (Supp. 1972), Christiansburg Garment Company, Inc., (Christiansburg) petitioned the district court for an allowance of attorney's fees under Section 706 (k) of the Act, 42 U.S.C. §2000e-5 (k). The petition was denied and Christiansburg has appealed.

On February 1, 1968, Rosa C. Helm, a black employee of Christiansburg, was laid off from her job in petitioner's plant in Christiansburg, Virginia. She returned to work about one month later, and in May of 1968 filed a charge with the Commission alleging racial discrimination in her one-month lay off. The charge was processed and investigated by the Commission and by letter dated February 11, 1970, Christiansburg was advised that there was reasonable cause to believe that it had engaged in employment practices violative of Title VII. Attempts at conciliation were unsuccessful, and by letter of July 1, 1970, the Commission notified Mrs. Helm of her right to sue. Mrs. Helm, however, did not exercise her right within the thirty day statutory period.[1]

Under the 1972 Amendments to the Civil Rights Act of 1964 which became effective on March 24, 1972,[2] the Commission was authorized to bring suit in its own name to secure compliance with Title VII, and in December of 1973 the Commission notified Christiansburg that it intended to pursue Mrs. Helm's claim. Attempts to resolve the controversy failed and the Commission instituted suit in the district court against Christiansburg on January 25, 1974. After discovery proceedings were concluded, Christiansburg filed a motion for summary judgment. The district court, holding that the Commission had no authority to prosecute the action under the 1972 Amendments, granted the summary motion on the basis that Mrs. Helm's claim was not pending with the Com-

[1] 42 U.S.C. §2000e-5(e).

[2] Pub. L. 92-261, 86 Stat. 103.

mission on the effective date of the 1972 Amendments as required by Section 14 thereof.[3] The court concluded that when Mrs. Helm was notified on July 1, 1970, of her right to bring suit against Christiansburg there was no further action to be taken by the Commission with respect to her charge and, accordingly, its authority terminated on that date.[4] The Commission did not appeal from this judgment.

In July of 1975, Christiansburg filed its petition for attorney's fees pursuant to Section 706 (k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5 (k), which provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

The district court denied the petition, stating that the Commission's action in bringing the suit could not be characterized as unreasonable or meritless, and that it represented a good faith effort by the Commission to discharge the duties assigned to it by Congress under the Civil Rights Act.

While the Commission took the position in the district court that Section 706 (k) does not authorize an award of attorney's fees against it, it now concedes that the district court

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[3]Section 14 of Pub. L. 92-261 reads as follows:

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

[4]The opinion of the district court appears sub nom, Equal Emp. Op. Com'n. v. Christiansburg Garment Co., Inc., 376 F. Supp. 1067 (W. D. Va. 1974).

had such authority under the statute. In making this concession, it recognizes the authority of *United States Steel Corporation v. United States*, 519 F.2d 359 (3 Cir. 1975), and *Van Hoomissen v. Xerox Corporation*, 503 F.2d 1131 (9 Cir. 1974), with which we are in accord. The Commission also concedes that Christiansburg was the prevailing party in this litigation, but contends, however, that the district court acted properly in denying attorney's fees in this case. Christiansburg, on the other hand, takes the position that the court applied an erroneous standard in rejecting its petition.

In private Title VII suits, where the suing party is, in effect, a "private attorney general," attorney's fees are normally awarded to a successful plaintiff upon the basis that such a policy will further the Congressional goal of eliminating discriminatory practices in employment. We so held in *Robinson v. Lorillard Corporation*, 444 F.2d 791 (1971), and *Lea v. Cone Mills Corporation*, 438 F.2d 86 (1971), where we applied the rationale of *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), in Title VII litigation. However, these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant. The distinction between the two was noted by Judge Adams in *United States Steel Corporation v. United States, supra*, 519 F. 2d, at 364:

> "A prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest. In contrast to the advantage to the public that inheres in a successful attack against discriminatory practices, as in *Piggy Park*, one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination. Instead, a

defendant seeking a counsel fee under Section 706(k) must rely on different equitable considerations."[5]

Christiansburg acknowledges that its posture is different from that of a successful party plaintiff, but contends that the reasonableness of the Commission's conduct in pursuing the litigation should be the controlling standard rather than the good faith test which was applied by the district court. It suggests that "good faith" is a highly subjective standard that is inappropriate in the determination of attorney's fees. The good faith standard, however, has been often recognized by the courts, and has acquired a well-defined meaning in this context.[6] It was approved by the court in *United States Steel Corporation v. United States, supra*, 519 F.2d., at 364:

> "The indicia associated with the grant of an attorney's fee-vexatiousness, bad faith, abusive conduct, or an attempt to harass or embarrass—were absent. We do not find the district court's formulation of the standard to be erroneous."

It would appear that this same standard was applied by the Ninth Circuit when it allowed attorney's fees in *Van Hoomissen v. Xerox Corporation, supra*.[7]

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[5]In that case, like the one presently before us, the Commission was a litigating party. The distinction would apply, a fortori, in those actions brought by private parties. *See* Wright v. Stone Container Corp., 524 F. 2d 1058 (8 Cir. 1975).

[6]**See** Alyeska Pipeline Co. v. Wilderness Society, 421 U. S. 240, 245 & 258 (1975).

[7]In denying rehearing in that case the court stated:

> "The court in allowing attorney's fees was mindful that the appeal by EEOC was vexatious and prosecuted on highly questionable grounds." Unpublished Order (9 Cir. No. 74-1037, Nov. 6, 1974).

In the present case the district court noted that it had ruled in favor of the Commission on two of the three grounds raised by the petitioner in its motion for summary judgment, and further observed that the interpretation of Section 14 of the 1972 Amendments was an issue of first impression requiring judicial resolution. We agree with the court below that under these circumstances it could not be said that the Commission acted in bad faith in bringing the lawsuit. Accordingly, the action of the district court is affirmed.

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I

I think it worth mentioning that the Ninth Circuit, in *Van Hoomissen v. Xerox Corp.*, 503 F2d 1131 (9th Cir. 1974),[1] has come to the opposite conclusion in a case very nearly indistinguishable on its facts from that present here.

The rule announced by the majority in this case follows *United States Steel Corp.*, and is that attorneys' fees should not be awarded to a prevailing defendant in a Title VII case unless it may be said that the plaintiff ". . . acted in bad faith in bringing the lawsuit."

In *Van Hoomissen*, the EEOC had attempted to intervene and assert two contentions in the district court; one that Xerox had engaged in retaliation against an employee, and, second, that Xerox discriminated against employees. The district court allowed intervention but restricted its application to the retaliation claim, not permitting litigation of the dis-

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[1]Reported on the merits of dismissing the appeal in 497 F2d 180 (9th Cir. 1974) and in the district court in 368 F. Supp. 829 (1973).

crimination claim. Upon appeal from the denial of intervention as to the discrimination claim, the Court of Appeals dismissed the appeal on the ground that whether or not to allow the EEOC to intervene in the district court was a matter of discretion which had not been abused. There was no intimation of bad faith, harassment, or the like, on the part of the EEOC anywhere in the proceeding, which, concerning itself with technical matters only, was much like that present here. The court held that since Xerox prevailed in the appeal, it qualified as a "prevailing party" under the statute, thus making it eligible for an award of attorneys' fees, and concluded that ". . . we exercise our discretion and award Xerox an attorney's fee of $3,000." p. 1133.

The point I make is illustrated by *Van Hoomissen*. Bad faith on the part of a losing plaintiff in a Title VII case should not be the necessary prerequisite to awarding attorneys' fees.

II

I have mentioned *Van Hoomissen* by way of illustration that there is a conflict in the circuits on this point, and that I think the rule illustrated by that case is preferable.

The principal point of my dissent, however, is that the opinion of the majority creates a double standard in the application of Title VII. Employers are forbidden by the Civil Rights Act to apply double standards to their employees, and I do not accept the proposition that the courts should administer one standard for the plaintiff and a very different standard for the defendant in the prosecution and defense of suits under the statute.

The statute involved here permits the district court ". . . in its discretion . . . [to] allow the prevailing party . . . a reasonable attorney's fee. . . ." 42 USC §2000e-5(k).

It was a statute phrased in like words which the Supreme Court construed in *Newman v. Piggie Park Enterprises*, 390 US 400 (1968), in which the Court held that a prevailing plaintiff under Title II of the same statute "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." p. 402. We followed that reasoning in construing the same statute involved in this case in *Robinson v. Lorillard Corp.*, and *Lea v. Cone Mills Corp.*, as has been noted by the majority.

All of these cases, however, were followed by *Alyeska Pipeline Co. v. Wilderness Society*, 421 US 240 (1975), which put to rest the private attorney general theory of recovery of attorneys' fees unless authorized by statute. *Alyeska* construed 42 USC §2000a-3(b) and *Newman* that ". . . the award should be made to the successful plaintiff absent exceptional circumstances." p. 262. But the opinion continued on the same page "Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for the Congress to determine."[2]

In our case, Congress has determined that an attorney's fee "may" be allowed to "the prevailing party" by the court "in its discretion." And the standard under this Title VII language has been construed under Title II as an award to a prevailing plaintiff absent exceptional circumstances.

The majority supports its denial of the same standard to prevailing defendants as to prevailing plaintiffs in this way: However, these policy considerations which support the award of fees to a prevailing plaintiff are not present in the

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[2]I am aware of S.2278, 94th Congress, 2nd Session, and Senate Report 94-1011.

case of a prevailing defendant."[3] I suggest that policy considerations are not matters for the courts but are matters for Congress. Since Congress has provided that a prevailing defendant may recover an attorney's fee for the successful defense of a suit, no reason exists to apply a radically different standard to a prevailing defendant than to a prevailing plaintiff.

Acknowledging that it is the policy of the United States to eliminate discrimination in employment, as well as in other aspects of our national life, how can it be said that it is not the policy of the United States to allow a defendant to recover an attorney's fee for the successful defense of a claim against it which is without merit? A mere colorable claim, although without merit, is easy to come by. The dozens of records which cross our desks each day are proof certain of that fact. The remedies provided under the statute are radical and undoubtedly would not have been imposed had Congress not believed it necessary to achieve the national goal. But the remedies are no less than government by injunction. This is pointed out in the Legislative History, U. S. Code Congressional and Administrative News, 1964, p. 2415. And while government by injunction is to be abhorred, it is no stranger to our system. Dozens of statutes attest to the contrary. I mention this, not to criticize the statute, but to point out that, like *Dombrowski*, it is strong medicine. Union contracts entered into in good faith, for example, are casually set aside; and awards against defendants running into the hundreds of thousands or even millions of dollars are not uncommon.

Yet the fact that the remedy is so radical, to me, is not inconsistent with an intent of Congress that an unsuccessful

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[3]While the majority properly gives significance to a policy not to discourage suits under Title VII, it fails to consider any countervailing policy short of bad faith.

plaintiff be required to pay attorneys' fees under a standard not substantially different from that of an unsuccessful defendant. Especially where the government is the plaintiff, with its limitless resources and sensitivity to the political winds of the moment, it should not be allowed to escape attorneys' fees by hiding behind a double standard.

The net result we end up with as result of the majority opinion, under a statute which says the court may allow an attorney's fee in its discretion to the prevailing party, is that a prevailing plaintiff is allowed an attorney's fee absent exceptional circumstances, while a prevailing defendant under the same statute is not allowed an attorney's fee unless the plaintiff has prosecuted his action in bad faith. I suggest this is not the level floor the courthouse demands.

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